SUPREME COURT, U. S.

473

FILED

AUG 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 23,058

SOUTHERN RAMBLER SALES, INC.
Appellant,

versus

AMERICAN MOTORS CORPORATION and
AMERICAN MOTORS SALES CORPORATION,
Appellee.

Appeal from the Court of Appeals for the Fifth Circuit
Honorables Gewin and Goldbert, Circuit Judges, and
Spears, District Judge.

PETITION FOR WRIT OF CERTIORARI

CHARLES A. O'NIELL, JR.
American Bank Building
New Orleans, Louisiana 70112
522-1879

Gibson Tucker, Jr.
Russell J. Schonekas
of Counsel

SUPREME COURT OF THE UNITED STATES

No. 23,058

SOUTHERN RAMBLER SALES, INC.,
Appellant,

versus

AMERICAN MOTORS CORPORATION and
AMERICAN MOTORS SALES CORPORATION,
Appellees.

Appeal from the Court of Appeals for the Fifth Circuit
Honorables Gewin and Goldbert, Circuit Judges, and
Spears, District Judge.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Southern Rambler Sales, Inc., with respect shows unto the Honorable Court as follows, to-wit:

1.

Citation to Official Report of Opinion Delivered in the Court Below

The opinion rendered by the Court below is reported in 375 F.2d 932.

2.

Grounds for the Court's Jurisdiction

The decree sought to be reviewed was rendered and entered on April 10, 1967, and rehearing denied on May 8, 1967. The jurisdiction of this Honorable Court is invoked 28 U.S.C.A. 2101 (c).

3.

Questions Presented for Review

a) Did the actions of American Motors Corporation constitute bad faith within the meaning of the Automobile Dealers' Day in Court Act (15 U.S.C.A. 1221-1225)?

b) Is the interpretation given this act by lower courts too narrow in scope so as to render it unenforceable against automobile manufacturers, thus defeating the whole purpose of Congress in passing the act?

c) Does there actually exist an issue as to a material fact in this case that would constitute the granting of a summary judgment in this matter an incorrect ruling?

MAY IT PLEASE THE COURT:

Statement of the Case

Complainant, a local corporation franchised by the defendants as a dealer for the sale and distribution of the automobiles manufactured by the defendants,

brought this action under "The Automobile Dealer Franchise Act of 1956", 15 USCA, Section 1221, et seq.

In its complaint the plaintiff sets out that it was enfranchised as a dealer for the defendants beginning in January, 1958, and continued as such through January, 1960, by annual renewals of the franchise. The complaint charges that the defendants represented to the plaintiff that no competing franchises would be offered to other dealers in the area without first submitting the additional franchise to plaintiff for plaintiff's refusal. Early in the dealings between the parties, this agreement was violated by the defendants and they thereafter entered upon a course of coercive, unfair and inequitable dealing with the plaintiff in the distribution of the defendants' product by delivering to plaintiff slow-moving and unsalable lines of automobiles manufactured by the defendants, and withholding from plaintiff the more readily salable lines; and by delivering these more readily salable items to the plaintiff's competitors.

By May, 1960, this conduct on the part of the defendant had brought the plaintiff to the point of selling its business and an agreement for the sale of the business to Mr. Sam Capaci and Mrs. Willie Cotaya had been reached, and the physical plant of the business had actually been turned over to them for operation.

At that time, it is charged in the complaint ,the defendants, instead of approving the sale of the business and the transfer of the franchise to the purchasers, entered into a direct agreement with these same pur-

chasers, granting them a new franchise and setting them up in a new business, as a result of which they withdrew from the agreement to buy from plaintiff.

As a result, the plaintiff was forced into a liquidation of its business, all resulting in the damages for which it sued.

The defense denies any of the charges made, protests its good faith in all dealings, denies the existence of the agreement not to grant competing franchises and contends that it complied fairly and equitably with all of its obligations under the franchise. Defendants affirmatively alleged that the franchise was voluntarily terminated by the plaintiff in July, 1960.

The deposition of the plaintiff's president and primary stockholder was taken by the defendants and is on file at page 74 of the transcript.

Defendants moved for summary judgment, attaching affidavits and exhibits to the motion, and on April 28, 1965, the court granted the motion, dismissing plaintiff's suit (Tr. p. 281)

Plaintiff moved for a new trial and in connection with this motion, moved for the production of certain documents by the defendants (Tr. pp. 282-287). On August 4, 1965, after hearing, the court denied the motion, and plaintiff appealed from the granting of the motion for summary judgment, and the denial of the motion for a new trial (Tr. p. 315).

On April 10, 1967, the U.S. Ct. of Apps., for the Fifth Circuit affirmed the Trial Court's decision and on May 8, 1967, denied a petition for rehearing of the case.

From the decision of the Court of Appeals, plaintiff now appeals.

Southern's President, Mr. Grady, sued, and used as the basis of his action 15 USCA 1221-1225, "The Automobile Dealer Franchise Act of 1956". Specifically sections 1221 and 1222 state that dealer and manufacturer must at all times maintain good faith in their dealings with each other, free from coercion and intimidation.

It was Grady's contention, in his pleadings and in his deposition, that there was a complete lack of good faith on the part of American in the following ways. American had made oral representations to the effect that they would supply Southern with a fair balanced inventory of salable vehicles. (Tr. pp. 102-105, 144-146, 150 151, 153-154, and 202). Grady claimed he didn't get his share of them, but was loaded up by the factory with unsalable models and parts. Is this the standard of good faith which the act imposes?

American also orally agreed not to issue another franchise in the area without giving Grady the option of first refusal. (Tr. p. 136-137). A new franchise was issued without Grady's knowledge or consent, a franchise which had great effect on his sales by capturing a large slice of Southern's market. Does this constitute good faith?

And when, as a result of these discriminatory practices, Grady finally came to the conclusion that he must sell out and salvage what he could, he found two buyers, Mr. Capaci and Mrs. Cotaya (Tr. p. 178). Agreements were reached, credit was approved, and Capaci and Cotaya even operated the business for two days. Then came the coup de grace which finally broke Grady's back. American went to the two buyers directly and, without Southern's knowledge, undercut them and arranged for the direct purchase of a brand new franchise by the buyers from American, thus, killing any opportunity for Grady to salvage some of his investment. The only thing he could then do was to cancel his franchise and take advantage of the repurchase agreement as set out in the franchise contract (Tr. p. 47) whereby American would buy back from him any unsold new cars in his inventory at the time of cancelling of the franchise. Is this the good faith standard required by the Act?

The admissability of these oral statements to alter what is on the face of a written contract is not an issue here. But admissable they are to establish a pattern of discrimination and calculated effort to bring about the economic demise of Southern. And add to this a written contract which itself is to a great degree favorable only to the manufacturers, not the dealer, and to which a dealer is forced to affix his name if he desires to enter the automobile business at all, and one can clearly observe a pattern of intimidation and coercion which allows the manufacturer to manipulate the dealer and control his actions to any extent he pleases. And cer-

tainly this constitutes what amounts to bad faith as defined in the Act.

Southern does not argue contract law and parol evidence rules. It argues that a seemingly routine contract for a franchise taken together with oral representations made to the dealer are in fact weapons of coercion exonerating the manufacturer from practically any misconduct which might arise in dealings with his franchise holder. Southern argues that the contract taken along with the violations of the oral agreements constitute the bad faith referred to in the act and gives the dealer a right of action and a "day in Court" against the manufacturer. To the extent that the written franchise contract is modified by the Act, this forms the basis of Southern's action.

True, of the few cases decided which were based on this Act, none have held for the dealer. In these cases, even some of the very acts complained of herein were held not to be coercive and in bad faith within the meaning of the act. *Alfieri vs. Willys Motors, Inc.*, E.D. Pa. 1964; 227 F. Supp. 627; *Augusta Rambler Sales, Inc. vs. American Motors Sales Corp.*, N.D. Ga. 1962, 213 F. Supp. 889; *Globe Motors, Inc. vs. Studebaker-Packard Corp.*, 3 Cir. 1964, 328 F. 2d 645; *Garvin vs. American Motors Corp.*, 3 Cir. 1963, 318 F. 2d 518; *Victory Motors of Savannah vs. Chrysler Motors Corp.*, 5 Cir. 1966, 357 F. 2d 429.

But none of the cases contained all of the violations complained of herein. None established a clear pattern of harrassment as can be seen herein.

The very fact that all of these cases were against the dealer points to the reason this Honorable Court should hear this case. With this Act, Congress intended to overcome the distinct advantage possessed by the manufacturer and give the dealer a better bargaining position in his negotiations. The standard of good faith was imposed. The act attempts to eliminate any and all intimidation and coercion. And yet the lower Courts have in all cases interpreted various actions by manufacturers as not being the bad faith referred to in the Act, thus discharging any gains in bargaining power the various dealers thought they might have acquired with the passage of such an Act, Thus on the one hand we have Congress attempting to alleviate a problem and give the dealers some veil of protection from coercion and intimidation, and on the other hand, the Courts are taking away any such protection with their narrow interpretation of the Act and what actually constitutes the bad faith defined therein. We respectfully submit that, thus interpreted, the Act is not achieving the purposes for which it was written, and to this extent, this Honorable Court should consider the intent of Congress in passing the Act and the obviously erroneous interpretation given to it by the Courts. In hearing the matter, the Court can alleviate this problem and re-establish the Act in a prospectus of proper interpretation.

Finally to consider the granting of a summary judgment in this matter, this Honorable Court could rule no other way, but to not allow such a motion. Grady testified at length under oath, as to his knowledge and beliefs concerning American's dealing with him. His deposition was made part of the record (Tr. p. 74-214).

At the hearing on the motion for summary judgment, certain affidavits of representatives of American, namely of Mr. Chalfant and Mr. Daley (Tr. p. 221), denying the existence of any oral agreements and alleging good faith dealings at all times on the part of American were introduced. In granting the summary judgment, the trial judge, as did the Court of Appeals, dismissed Grady's sworn testimony given under cross examination as unbelievable, and embraced the affidavits of American employees as statements of the true situation in this case. What can be more of a "genuine issue as to any material fact" (Rule 56, Federal Rules of Civil Procedure) than the sworn testimony on the one hand contradicted by affidavits on the other. These witnesses too might have been considered to, in the words of the Court, "lack specificity and are suppositious, speculative, conclusory and unfactual" (Opinion of the Fifth Circuit Court of Appeals, p. 9) had they been subjected to extensive cross examination. The Court, in stating that Grady's deposition lacks specificity, etc. violates the cardinal rule in dealing with motions for summary judgment for the court is thereby doing nothing more nor less than balancing the affidavits of Chalfont and Daly against the deposition of Grady and electing to accept the affidavits over the deposition. This is not a function to be performed by the court on a motion for summary judgment. So long as there is a conflict on any material issue of fact, the motion must be denied.

In summary, it is respectfully submitted that because of the *series* of incidences related by Grady under oath, attributable to American, these actions do

indeed constitute the bad faith within the meaning of the "Automobile Dealers Franchise Act of 1956". As a result of the narrow interpretation given by the lower Courts as to what constitutes bad faith on the part of the manufacturer, the purpose for which the act was drawn is defeated and dealers are again at the mercy of the all powerful manufacturer without the protection from coercion and intimidation which Congress intended with this Act to give. And consequently, the dealer is not given his day in Court. And because the lower Court could find no genuine issue as to a material fact when a deposition of record gave direct opposite interpretation of the facts from affidavits admitted in support of a motion for summary judgment, the granting of the said motion was an error of the lower Court and did indeed actually deprive the dealer of his "day in Court."

We respectfully submit that because of the above, the trial and appeals Courts should be overruled on their granting of said motion and this case be remanded to the District Court for trial on the merits.

Respectfully submitted,

CHARLES A. O'NIELL, JR.
American Bank Building
New Orleans, Louisiana 70112
522-1879

Gibson Tucker, Jr.
Russell J. Schoenekas
of Counsel

CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

CHARLES A. O'NIELL, JR.